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September 3, 2008

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Hand Delivery

Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, D C 20423-0001

Re: STB Finance Docket No. 35087
Canadian National Railway Company and Grand Trunk Corporation – Control – EJ&E West Company

Dear Ms. Quinlan:

Enclosed for filing is an original and 10 copies of the Village of Barrington's Reply to Applicants' Petition to Modify the Procedural Schedule in the above-captioned proceeding

Please acknowledge receipt of this filing by date-stamping the acknowledgement copy and returning it to our messenger.

Respectfully submitted,

Brendon P. Fowler

Enclosures

BARR-5

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No 35087

CANADIAN NATIONAL RAILWAY COMPANY AND GRAND TRUNK CORPORATION
– CONTROL –
EJ & E WEST COMPANY

THE VILLAGE OF BARRINGTON'S REPLY TO APPLICANTS' PETITION TO MODIFY THE PROCEDURAL SCHEDULE

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ATTORNEYS FOR
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Dated. September 3, 2008

BARR-5

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 35087

CANADIAN NATIONAL RAILWAY COMPANY AND GRAND TRUNK CORPORATION
– CONTROL –
EJ & E WEST COMPANY

THE VILLAGE OF BARRINGTON'S REPLY TO APPLICANTS' PETITION TO *MODIFY THE PROCEDURAL SCHEDULE*

Pursuant to 49 C F.R § 1104.13, the Village of Barrington, Illinois ("Barrington"), on behalf of itself and the surrounding townships and municipalities that rely on Barrington for essential services (collectively the "Barrington Community"),[1] hereby submits this Reply to Applicant's Petition to Modify the Procedural Schedule to Provide for a Prompt Final Decision on the Merits under 49 U S.C § 11324(d)(1) Subject to a Condition Preserving the Environmental *Status Quo* Pending Environmental Review (the "CN Petition") For the reasons set forth below, the CN Petition should be denied.

I. Background

On October 30, 2007, Applicants filed an Application seeking authority to acquire and control EJ&E West Company On November 26, 2007, the Board accepted the Application, designated the proposed transaction as a "minor" transaction, announced its intention to prepare an Environmental Impact Statement ("EIS") and established a procedural schedule. *See* Decision No. 2 With respect to the procedural schedule, the Board made it very clear that its

[1] The Barrington Community consists of the Villages of Barrington, Barrington Hills, Deer Park, Lake Barrington, North Barrington, South Barrington and Tower Lakes, and Barrington and Cuba Townships

final decision on the merits of the proposed transaction would be issued after completion of the EIS:

> Under 49 U.S.C. 11325(d)(2), a final decision would be issued by April 25, 2008, however, the Board is also required to accommodate in its decisionmaking the requirements of the National Environmental Policy Act (NEPA), 42 U.S.C 4321 et seq Thus, the Board will not issue a final decision on the merits of the application until the environmental review is completed, including preparation of an EIS and a substantial opportunity for public comment and participation

Decision No.2, slip op at 2 [2]

The Board made it abundantly clear that the final EIS would not be issued before April 25, 2008

> The time the EIS will take to prepare cannot be determined ahead of time because there is no way to predict in advance all of the specific issues that may arise In prior cases, the EIS process has ranged from approximately 18 months to several years.

Decision No 2, slip op at 16. Applicants did not file a Petition for Reconsideration with respect to Decision No 2 [3]

On May 13, 2008 Applicants filed Applicants' Request for Establishment of Time Limits for NEPA Review and Final Decision ("Applicants' Request for Time Limits"). Applicants asserted therein, among other things, that the Stock Purchase Agreement ("SPA") between CN

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[2] The procedural schedule is set forth in Appendix A also made it clear that the final decision would be issued after completion of EIS process. Decision No 2, slip op at 19, n 20

[3] In a recent August 29, 2008 letter filed with the Board in this proceeding, the National Industrial Transportation League ("NITL") also tries to reargue similar issues related to Decision No. 2 In particular, NITL misconstrues the decision as allegedly providing that "a final decision would be issued by April 25, 2008, i.e , within the statutory deadline." *Id* at 2. Contrary to NITL's representations, Decision No 2 repeatedly stated that the date of any final decision was subject to the completion of the NEPA review process. Decision No 2, slip op , at 2, 12, 19 n 20

and EJ&E contains a "drop-dead" date of December 31, 2008. Applicants' Request for Time Limits at 12

On July 25, 2008, the Board issued a decision addressing Applicants' Request for Time Limits and setting a schedule for completion of the environmental review and issuance of a final decision. *See* Decision No. 13. The Board noted that Section 9.1(b) of the SPA appears to mean that the December 31, 2008 "drop-dead" date does not apply if the Board has not completed the environmental review process *See* Decision No 13 at 5-6.

On August 14, 2008, Applicants filed the present petition, seeking a decision modifying the procedural schedule to provide for a Board decision on the competitive "merits" of the proposed transaction by October 15, 2008 (effective 30 days later), subject to a condition that Applicants preserve the environmental *status quo* pending completion of the Board's environmental review. *See* CN Petition at 1-2 The Applicants seek this bifurcated decision schedule so that they can close the proposed transaction by December 31, 2008 and avoid what they characterize as the "substantial risk"(*id* at 8) that the EJ&E will terminate the SPA if the parties do not close by that date The CN Petition makes no reference to Section 9 1(b) of the SPA and does not otherwise address the Board's observation regarding the inapplicability of the December 31, 2008 "drop-dead" date.

II. Argument

There are several problems with Applicants' proposed bifurcated schedule (1) it would violate NEPA by precluding adoption of the No-Action Alternative,[4] (2) Applicants have not

[4] As explained below, there is no Board precedent for a bifurcated schedule that would eliminate the No-Action Alternative

shown that they need the bifurcated schedule to avoid the harm they allege; and (3) Applicants are 8 months late in seeking it, and improperly attempt to do so under 49 C F.R § 1117 1

The primary problem with the CN Petition is that it presupposes that the Board will not deny the proposed transaction on environmental grounds One of the alternatives under study by SEA is the No-Action Alternative. *See* DEIS at ES-9 [5] If SEA recommends the No-Action Alternative, and the Board adopts it and denies the proposed transaction on environmental grounds, CN will not close the proposed transaction [6] Until the environmental review is completed, no one can be sure the Board will authorize CN to close the proposed transaction If adopted, the bifurcated schedule would violate NEPA by artificially foreclosing an alternative under environmental review before the end of the review [7]

There is no Board precedent for granting the CN Petition Applicants rely on three cases where the Board deferred environmental review until after determining the "merits" of the underlying transaction. In two of these cases, the Board deferred consideration of the environmental impact of construction of a new rail line into the Powder River Basin, because it was not clear that the line would ever be constructed. In *Canadian Pacific Ry. – Control – Dakota, Minnesota & Eastern R.R* , STB Finance Docket No 35081, (STB served April 3, 2008)

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[5] The Council on Environmental Quality ("CEQ") regulations require SEA to study the No-Action Alternative. *See, e g* , 40 C.F R. §§ 1502 14(d), 1508 25(b)(1) The CEQ regulations also expressly prohibit agency action that would "[l]imit the choice of reasonable alternatives." 40 C F.R 1506 1(a)(2).

[6] The outcome would be the same if SEA recommended a different alternative but the Board denied the proposed transaction on environmental grounds.

[7] *See* Decision No. 13 at 9 (Commissioner Buttrey *concurring*, by separate expression) *Cf. Alaska Railroad Corp. – Const. and Oper Exempt – Rail Line between Eielson AFB and Fort Greely, AK*, STB Finance Docket No. 34658 (STB served October 4, 2007) at 2 (where the Board noted that it has authority to deny a rail line construction proposal on environmental grounds).

("CP/DM&E"), the Board determined that it could authorize Canadian Pacific's proposed acquisition of the Dakota, Minnesota & Eastern Railroad ("DM&E") without conducting an environmental review of potential coal movements that would result if DM&E constructed a new line into the Powder River Basin The Board elected to not do the environmental review of the potential DM&E Powder River Basin coal traffic because Applicants there had not made a decision to build the new line *Id* at 8. Similarly, in *Iowa, Chicago, Eastern R R – Acquisition and Operation Exemption – Lines of I&M Rail Link, LLC*, STB Finance Docket No. 34177 (STB served July 22, 2002), the Board's decision not to stay the effective date of the Notice of Exemption was based on its conclusion that it would evaluate the environmental impact of Powder River Basin coal moving over the subject lines if and when DM&E's new line was constructed *Id* at 13.

In the third case relied upon by Applicants, the Board deferred consideration of environmental impacts in two cities (Reno and Wichita) from a major transaction involving rail lines in 23 states. *Union Pacific Corp. – Control & Merger – Southern Pacific Rail Corp.*, 1 S T.B 233 (1996), *aff'd sub nom Western Coal Traffic League v. STB*, 169 F 3d 775 (D.C Cir 1999 ("UP/SP") The Board's decision to allow the transaction to move forward was based upon the following conclusion

> Nothing in the record here, however, suggests that the potential environmental effects of the merger in Reno or Wichita are so severe that implementation of the merger should no proceed prior to the completion of the studies.

UP/SP at 220.

The first two cases relied upon by Applicants involved potential environmental harm from coal movements that might never occur. The third case involved a very small part of the overall transaction, where the Board concluded that the potential environmental effects were not

so severe as to preclude the merger while the environmental review was completed. Here, in stark contrast, Applicants propose that the Board issue a decision and allow closing, but defer consideration of the environmental impact of the *entire* transaction (no part of which is contingent) in a case where it is obvious to everyone that the potential environmental effects of the transaction are severe.

Second, Applicants have not demonstrated that they need the extraordinary relief they seek As noted, Applicants make no mention of Section 9 1(b) in the CN Petition. Even after the Board identified and analyzed the critical ambiguity, Applicants make no effort to explain it Applicants do not say whether they share EJ&E's view that EJ&E may terminate the SPA if the parties do not close by December 31, 2008 To the best of Barrington's knowledge, Applicants have not sought a judicial determination regarding the alleged "drop-dead" date Applicants should not be granted relief from the present procedural schedule, upon which hundreds of other parties are relying, when Applicants have not even shown that the failure to grant the relief they seek would cause the harm they allege.

Finally, the CN Petition is late and subject to numerous procedural infirmities. CN purports to bring its Petition pursuant to 49 C.F R. § 1117.1. Petition, at 1 Section 1117 1 is an inappropriate basis for a petition to modify Decision No. 2. Section 1117 1 is merely a catch-all provision that provides that a party "seeking relief *not provided for in any other rule* may file a petition for such relief " *Id* (emphasis added). However, the subject matter of the CN Petition is a substantive request to modify the procedural schedule established in Decision No. 2 – a request properly within the ambit of a request for reconsideration under 49 C.F.R. § 1115 3 The Board has held that section 1117.1 does not apply when other procedures exist that apply specifically to the type of relief sought. *See City of Peoria and the Village of Peoria Heights, IL - Adverse*

Discontinuance - Pioneer Industrial Railway Company, STB Docket No AB-878 (Board served April 11, 2008), at 2. There, as here, a party filed a petition under section 1117.1 to modify and hold in abeyance a prior decision The Board rejected that effort immediately, noting that "to modify [the prior decision], which has already become effective, [petitioner] should have filed a petition for reconsideration under 49 CFR 1115.3 (within 20 days of the [decision]) or a petition to reopen an administratively final decision under 49 CFR 1115.4 " *Id* Furthermore, the onus to meet the standards under those sections is on petitioner, and petitioner's failure to address the relevant standards is fatal *Id* at 2-3 (*citing General Railway Corporation d/b/a Iowa Northwestern Railroad – Exemption for Acquisition of Railroad Line – In Osceola and Dickinson Counties, IA*, STB Finance Docket No 34867 (STB served July 13, 2007) (a moving party may not "*avoid the obligation of meeting those standards by assigning a different label to its request for relief*") (emphasis added))

Even if CN had properly brought its request as a petition for reconsideration, it was required to do so within 20 days of the issuance of Decision No 2, pursuant to 49 C F R § 1115 3. More than eight months have passed since the Board determined in Decision No 2 that the final decision would issue after completion of the EIS, and informed Applicants that the EIS would take many months. In any event, even prior to the issuance of Decision No 2, CN affirmatively conceded that the Board could extend the deadline for its final decision based on its obligations under NEPA [8] *See Reply of Applicants to Request of Village of Barrington for*

[8] Despite Applicants' own admission that NEPA could extend the date for a final decision, NITL erroneously contends that the "Board's desire for an environmental review cannot override the statutory requirement for a prompt completion of the transaction within the time limits established by the law." August 29, 2008 NITL Letter, at 2 Contrary to NITL's assertions, NEPA review is mandatory rather than merely "desired" by the Board, and the Board has clarified that both governing CEQ regulations and case law permit it to extend the final decision date until completion of the environmental review *See* Decision No 2, at 6

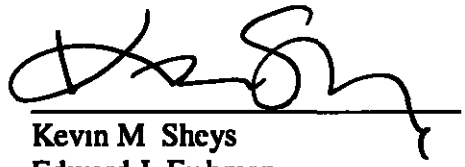
Preparation of Environmental Impact Statement (CN-8), STB Finance Docket No 35087, at 7 (filed November 21, 2007) ("CN recognizes . that as the Board gathers information in the course of its environmental review of the Transaction, it may find that, *to complete that review in accordance with its obligations under NEPA, it will need more than the 156 days called for in CN's proposed schedule, or even more than the 180-day maximum permitted for regulatory review of a "minor" transaction* .") (emphasis added)

It is long past the appropriate time for reconsideration of Decision No 2 The Board should permit the NEPA review to run its course, and incorporate SEA's findings into its final decision as required under the Board's implementing regulations.

III. Conclusion

For the reasons set forth above, the CN Petition should be denied

Respectfully submitted,

By 

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ATTORNEYS FOR THE VILLAGE OF BARRINGTON, ILLINOIS

Dated September 3, 2008

(*citing Western Coal Traffic League v. S.T.B.*, 216 F.3d 1168, 1172, 1175 (D.C 2000), and 40 C F.R § 1501.8(a)). Specifically, "[t]he fact that the proposed transaction has been classified as 'minor' does not control the determination regarding the time necessary to complete the environmental review " *Id.* NITL's attempts to re-argue this established point are both incorrect and time-barred.

CERTIFICATE OF SERVICE

I hereby certify that on September 3, 2008, I caused the foregoing Reply to Applicant's Petition to Modify the Procedural Schedule to Provide for a Prompt Final Decision on the Merits under 49 U S C § 11324(d)(1) Subject to a Condition Preserving the Environmental *Status Quo* Pending Environmental Review to be served via first class mail, postage prepaid, or by a more expeditious method of delivery, on all parties of record and on the following

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